IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 7TH MARCH 2007 / 16TH PHALGUNA 1928

SA.No. 207 of 1993(G)

AS.129/1992 of SUB COURT, PAYYANNUR
OS.170/1990 of MUNSIFF COURT, PAYYANNUR
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APPELLANTS/APPELLANTS/DEFENDANTS:
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1. MAYILAVALLI PAYYADAKATH LAKSHMI AMMA.
(DIED. LRS RECORDED)

2. CHILDREN -DO- KUNHIKANNAN

3. -DO- -DO- RAGHAVAN

4. -DO- -DO- BALAKRISHNAN

ALL RESIDING AT ALAPPADAMBA AMSOM
VADAVANTHUR DESOM, CANNANORE DISTRICT

IT IS RECORDED THAT APPELLANTS 2 TO 4 ARE THE LEGAL HEIRS OF THE DECEASED 1ST APPELLANT AS PER ORDER DATED 4/2/2003 IN CMP 117/03

BY ADV. SRI.V.GIRI
SRI.K.S.BHARATHAN

RESPONDENTS/RESPONDENTS/PLAINTIFFS:
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1. CHEMANCHERI PUTHIYAVEETTIL PARVATHYAMMA W/O.LATE PALANGOTAN KRISHNAN NAMBIAR, (DIED)

CHILDREN:

2. -DO- -DO- JANAKI

3. -DO- -DO- KUNHIRAMAN

4. -DO- -DO- KARTHYAYANI

5. -DO- -DO- RAGHAVAN

6.	-DO-	-DO-	KRISHNAN
7.	-DO-	-DO-	DAKSHAYANI
8.	-DO-	-DO-	SULOCHANA

IT IS RECORDED THAT RESPONDENTS 2 TO 8 ARE THE LEGAL HEIRS OF THE DECEASED 1ST RESPONDENT AS PER ORDER DATED 21/10/03 IN I.A.731/03

BY ADV. SRI.D.KRISHNA PRASAD
SRI.D.NARENDRA NATH
SRI.P.G.PARAMESWARA PANICKER (SR.)
SRI.P.GOPAL

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 7/3/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NO.577/93 IN SA 207/93

DISMISSED

7/3/2007

SD/-M.SASIDHARAN NAMBIAR,JUDGE.

//True copy//

PA to Judge.

M.SASIDHARAN NAMBIAR,J.

S.A .NO. 207 OF 1993

Dated 7th March 2007

J U D G M E N T

Defendants in O.S.170/90 on the file of Munsiff court, Payyannur are appellants. Plaintiffs are respondents. First appellant died and appellants 2 to 4 are impleaded as her legal heirs. First respondent died and respondents 2 to 8 are impleaded as her legal heirs. Respondents instituted the suit seeking a decree for recovery of possession of plaint schedule property on the strength of their title. Appellants and first respondent admitted that plaint schedule property originally belonged to Palangadan Tharavadu. Under Ext.A1 Kuzhikanam deed property described as 14½ X 14 koles (six feet koles), being north east portion Vayikkattu paramba was granted on kuzhikaman right in favour of Mandravathi Vadakkiniyil Raman. On the same day jenmom right of the remaining south and eastern portion of the property was given to the same Raman under Ext.B3 executed on the same day. Subsequently under Ext.A2

dated 18/10/1927 melkanam was given in favour of Narayanan Nambi and Vasudevan Nambi by Mandravathi Raman. Thereafter under Ext.A3, the assignees under Ext.A1 released their right in favour of Narayanan Nambi and Vasudevan Nambi. Later Narayanan Nambi and Vasudevan Nambi assigned their right under Ext.A4 in favour of Lakshmi, Kalyani, Parvathy and the unnamed child. On the death of Parvathy and unnamed child their rights also devolved on Lakshmi and Kalyani. Under Ext.A5, that right was transferred by them in favour of Chemmancherry Kokkanamadam Raman Nambiar. While Raman Nambiar was in possession of Ext.A1 property, he put first plaintiff in possession of the property. Later Kunhappa Nambiar who had some right as legal heir of Parvathy also released his right under Ext.A6 in favour of Raman Nambiar, the assignee under Ext.A5. On the death of Raman Nambiar assigned the property, under Ext.A7 in favour of first plaintiff. It is under Ext.A7 plaintiffs claim title to the plaint schedule property. Defendants are claiming right under Ext.B3. Under Ext.B3, Chathu Nair and others of Palangadan family transferred the jenmom right in respect of the south and west of the prop;erty covered under Ext.A1 to Manthravadi Vadakkiniyil Raman. Thereafter marupattom was executed and the property was

obtained on lease. Chathu Nair thereafter executed Ext.B4 possessory mortgage in favour of Pananthatta Cheriya Raman Nambiar. While the possessory mortgage was subsisting, as per registered document No.1181/36 right of equity of redemption was assigned by Chathu Nair in favour of Govindan Nambi and Raman Nambi. They in turn under Ext.B5 assigned that right in favour of Panayanthatta Raman Nambiar, the mortgagee. Thereafter, under Ext.B6 jenmom right of said property was also assigned in favour of Raman Nambiar by Vadakkiniyil Raman Nair, the assignee under Ext.B3. Defendants claim right under Exts.B5 and B6. Raman Nambiar on the strength of Exts.B5 and B6, instituted O.S.217/84 before Munsiff court, Payyannur seeking a decree for permanent prohibitory injunction. It was contended that the disputed property therein forms part of Exts.B5 and B6 properties. Respondents contended that disputed property is that portion of the property obtained by them under Ext.A7 which is the property covered under Ext.A1. A commission was appointed in that suit. Commissioner submitted Ext.A37 report and Ext.A38 plan. In Ext.A38 plan commissioner demarcated the disputed property as plot A. Commissioner also identified the property covered under Exts.B5 and B6 as plot B and C and property covered

under Exts.A1 to A7 as plot A therein. Learned Munsiff upholding the identity found that though defendants therein namely, plaintiffs in the present suit have title to the property appellants herein, plaintiffs in that suit are in possession of that property and therefore granted a decree for injunction. It was challenged before Sub court, Payyannur in A.S.62/87. Under Ext.A36 judgment Sub Judge upheld the findings of learned Munsiff that property covered under Ext.A7 is plot A marked in Ext.A38 plan. But finding that defendants/respondents herein have not proved their possession, appeal was dismissed. Appellants herein challenged that judgment before this court in S.A.912/90. That appeal was dismissed at the admission stage. But it was observed that finding on question of title in the suit is not final. Defendants therein filed the present suit thereafter seeking recovery of possession on the strength of their title. Defendants filed written statement denying the title and contending that plaint schedule property belongs to them and even if respondents have title, it was barred by adverse possession.

2. Learned Munsiff framed necessary issues. On the evidence of PW1, DW1, Exts.A1 to A39, Exts.B1 to B108 and Exts.C1 and C2 learned Munsiff found that plaint schedule

property is plot A marked in Ext.A38 plan in O.S.217/84 and it is the property covered under Ext.A1 which in turn was obtained by respondents under Ext.A7. Learned Munsiff also found that title of plaintiffs have been already settled under Exts.A33 decree and A34 judgment in O.S.217/84 and Exts.A35 decree and A36 judgment in A.S.62/87. A decree for recovery of possession was granted. Correctness of the decree and judgment were challenged before Sub court, Payyannur in A.S.129/92. Learned Sub Judge after re-appreciation of evidence confirmed the decree and judgment passed by learned Munsiff and dismissed the appeal. It is challenged in this second appeal.

3. Second appeal was admitted after formulating the following substantial questions of law.

> 1) Whether courts below was right in identifying the property solely on the basis of boundaries ignoring the extent and measurements given in the title deeds and if so, whether the finding that plaintiffs have title to the plaint schedule property is correct.
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> 2) Whether courts below were right in relying on the presumption of possession following title on

the facts and circumstances of the case and whether payments of revenue in respect of the suit property by appellants predecessor ever since 1959 establish title by adverse possession.

4. Learned counsel appearing for appellants and respondents were heard.

5. Arguments of learned counsel appearing for appellants was that courts below erred in treating earlier decree in O.S.217/84 as conclusive on the question of title. It was argued that in view of Ext.B106 judgment of this court in S.A.912/90 which leave open the question of title, courts below should not have held that title of respondents over plaint schedule property has become final. It was further argued that in a suit for recovery of possession on the strength of title plaintiffs cannot get a decree on the weakness of defence case and it is up to plaintiffs to establish the identity as well as title over the plaint schedule property and on the failure, suit can only be dismissed. It was also argued relying on the decisions of Apex court in **Moran Mar Baselios Catholicos and another v. Most Rev.Mar Poulose Athanasius and others (AIR 1954 SC 526)** that courts below should not have granted a decree

on the basis of identification of the property in O.S.217/84. It was vehemently argued that unless the entire properties are identified with reference to the respective title deeds identity of plaint schedule property cannot be fixed and as it was not done, courts below should not have granted a decree relying on Ext.A38 plan prepared by the Commissioner in the earlier suit. Learned counsel also argued that when Ext.A7 shows that property obtained by appellants was only having 14 ½ X 14 six feet kole measurements, which would come about 17 cents extent, courts below should not have granted a decree for recovery of possession in respect of 18.34 cents. It was also argued that if extent of property covered under Exts.B3 to B6 is calculated on the basis of kole measurements shown therein, total extent belonging to appellants would come about 95½ cents and as per Ext.A38 plan, the total extent covered by plots A to C is 96 cents and therefore courts below should have found that plot A forms part of Ext.B3 property. It was therefore argued that decree and judgment passed by learned Munsiff as confirmed by learned Sub Judge is unsustainable and are to be set aside. Relying on decisions of Division Bench of this court in **Savithri Ammal v. Padmavathi Amma (1990 (1)**

KLT 187), learned counsel argued that when conflict is between extent, area and boundaries and the property claimed by appellants as per the extent calculated on kole measurement is correct, courts should have preferred the same and should not have relied on Ext.A38 plan and granted the decree.

6. Learned Senior counsel appearing for respondents argued that question of identity of plaint schedule property has already been settled in O.S.217/87 and cannot be re-agitated. It was argued that the very dispute in the earlier suit was whether the disputed property forms part of the property belonging to appellants under Exts.B5 and B6 or belongs to respondents under Exts.A1 to A7 and learned Munsiff as well as learned Sub Judge found that the disputed property has been correctly demarcated by commissioner in Ext.A38 plan and even though there was some observations in Ext.A105 judgment in the second appeal which was dismissed without hearing respondents, that judgment will not effect the validity of the decision on the identity of the disputed plot. It was argued that plot A demarcated by Commissioner in Ext.A38 plan is held to be the disputed property which is the plaint schedule property herein and that fact was not in dispute before

the trial court as well as first appellate court. It was also argued that apart from relying on earlier identity, both trial court and first appellate court elaborately considered the identity of plaint A schedule property covered under Ext.A1 and was rightly found that plot A in Ext.A38 plan is the property covered Ext.A7 and therefore there is no reason to interfere with the decisions of courts below. Learned Senior counsel also argued that there is no substantial question of law involved in the appeal at all and even if question whether disputed plot A is the property covered under Ext.A38 plan is to be considered, on appreciating respective title deeds, Exts.A1 to A7 on one hand and Exts.B3 to B6 on the other hand, it is absolutely clear that plaint schedule property is the property covered under Ext.A1 and Ext.A7 which is plot A in Ext.A38 plan. Learned Senior counsel also argued that evidence of DW1, third defendant who was examined on behalf of all appellants, makes the position absolutely clear that appellants have no case that property was in their possession with an animus to possess it against the rights of respondents and therefore courts below rightly granted a decree for recovery of possession and appeal is only to be dismissed.

7. Even though under Ext.A105, at the time of dismissing second appeal, it was observed that question of title is left open the findings of learned Munsiff and learned Sub Judge with regard to the identity of the disputed property as demarcated by Commissioner in Ext.A38 plan has become final. Its identity cannot be disputed by appellants. Both courts on analysing documents of title relied on by the parties found that plot A in Ext.A38 plan could only be the property covered under Exts.A1 and A7. That is a finding of fact arrived at on analysing all relevant facts and evidence.

8. For a proper appreciation of disputes it is necessary to appreciate Ext.A1 as well as Ext.B3 documents executed on the same day. A reading of Exts.B3 and A1 makes it absolutely clear that what was transferred under Ext.B3 is the property excluding Ext.A1 property. Property covered under Ext.A1 is the north eastern portion of Vayikkatta Paramba comprised within the boundaries shown therein. Ext.B3 makes it clear that property transferred under Ext.A1 lies on the east and north of Ext.B3 property. Comparison of Exts.B3 and A1 establish that tak No.2 is situate on north of tak No.1 and property transferred under Ext.A1 lies to the east of tak No.2 and north of tak No.1. Even though in Ext.A7,

while describing southern boundary a mistake has crept in the southern boundary shown under Exts.Aa to A6 is the same. The property covered under Ext.A7 is also the very same property. It is therefore clear that the southern boundary shown in Ext.A7 is an inadvertent mistake . That mistake cannot be given undue importance. It is not disputed that property obtained under Ext.A7 is the very same property which was granted on kanam under Ext.A1. Therefore, even though southern boundary shown in Ext.A7 does not tally with the southern boundary of the disputed plot A of Ext.A38 plan it is absolutely clear that the property transferred under Ext.A7 is the property which lies east to tak No.2 and north of tak No.1 covered under Ext.B3. It establish that the property of appellants under Exts.B3, B5 and B6 lies to the west and south of the property covered under Ext.A1. Though learned counsel appearing for appellants vehemently argued that the north eastern portion of Vayikkattu paramba transferred under Ext.A1 is the property lying further to the east of the road demarcated by Commissioner in Ext.A38 plan, as rightly pointed out by learned Senior counsel it cannot be so because in that case the eastern and southern boundary of that property will not tally. Though learned counsel appearing for

appellants argued that when kole measurement provided under Exts.B3 to B6 title deeds show that appellants have property having an extent of above 95½ cents and plot A to C together form 96 cents and so plot A along with plots B and C shall be the property covered under Ext.B3, B5 and B6 in the light of specific boundaries under Exts.B3 and A7, the arguments cannot be accepted. Though reliance was placed on the Division Bench decision of this court in Savithri's case (supra) in that decision the earlier decisions of this court in **Krishnamurthy Iyer v. Janaki Amma (1957 KLT 886), Krishnan v. Mathai (1957 KLT 42) and in E.S.A.10/1979** was only re-iterated. The decision would only show that when one of the descriptions is vague and uncertain and another description is definite and certain, the latter has to be preferred. If none of the descriptions is vague or uncertain, that description which is more certain and stable and least likely to have been mistaken or inserted inadvertently, must be preferred if it sufficiently identifies the subject matter of the transaction and other descriptions must be rejected as erroneous or inaccurate. This is not a rule of law, but a mere rule of construction which appears to be safe and almost an infallible guide. In the light of the boundaries in

Exts.A1 to A7 and Exts.B3 to B6 and the identification of property with reference to boundaries, I find no reason to differ with the findings of courts below. If that be so, findings of courts below that respondents have title to the plaint schedule property under Ext.A7 is perfectly correct and warrants no interference.

9. Then the only question is whether appellants are entitled to the decree for recovery of possession. As rightly pointed out by learned Senior counsel appearing for respondents, in the light of the evidence of DW1 that appellants were never in possession of the suit property with an animus to possess against respondents and that too hostile to their interest as held by Apex court in **T.Anjanappa & others v. Somalingappa & others (2006 (7) SCC 570), a**ppellants cannot contend that title of respondents is barred by adverse possession. In such circumstances, respondents are entitled to the decree for recovery of possession granted. Learned counsel appearing for appellants then argued that as per the amended plaint the extent of plaint schedule property is 18.34 cents and if extent of the property covered under Exts.A1 and A7 as per kole measurements is calculated, it will not exceed 17 cents and therefore respondents are not entitled to the decree for recovery of possession of 18 cents. Plaint

schedule property was found to be the property covered under Ext.A1. The property cannot be identified and fixed with reference to the extent calculated in kole measurements. Property transferred under Exts.A1 to A7 is the property within the boundaries shown therein. When it is found that the property has been correctly demarcated in Ext.A38 plan as plot A, respondents are entitled to the decree for recovery of possession as granted by courts below.

10. Learned counsel appearing for appellants then pointed out that trial court had rejected the claim for mesne profits and plaintiffs/respondents did not challenge that portion of decree denying mesne profits in the appeal filed by appellants learned Sub Judge should not have granted a decree for damages the quantum of which is to be decided in the final decree. As rightly pointed out by learned counsel appearing for appellants, when trial court specifically considered that question under issue No.5 and held that there is no specific plea for mesne profit and therefore plaintiffs are not entitled to get a decree for mesne profits and plaintiffs did not file an appeal against that rejection for that portion of the plaint claim or failed to prefer cross objection in the appeal preferred by appellants, learned

Sub Judge should not have granted a decree providing that respondents/plaintiffs are entitled to mesne profits. Therefore, that portion of the judgment of learned Sub Judge is set aside. Appeal is dismissed on all other aspects.

Second appeal is allowed in part. The decree for recovery of possession passed by learned Munsiff in O.S.170/90 as confirmed in A.S.129/92 is confirmed except on the entitlement for mesne profits. The decree for mesne profits passed by Sub Judge in A.S.129/92 is set aside. No costs.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.No.207 OF 1993

7th March 2007

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